No. 87-6431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Was it error to deny petitioner's motions for judgment of acquittal on the charges of mail fraud where the mailing of automobile title documents by the subsequent purchasers of the automobiles in which petitioner had rolled back the odometers were actually counterproductive to his odometer tampering scheme, or at most routine mailings tangentially related to his scheme, and not in furtherance thereof?

2. Was it error to deny petitioner's request for a jury instruction on odometer tampering, 15 U.S.C. section 1984, as a lesser offense "inherently related" to the charged offense of mail fraud, 18 U.S.C. section 1341, where the abundant references to petitioner's odometer tampering may have influenced the jury to convict him of mail fraud in a weak case?

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

OPINIONS BELOW

This case was initially reported in a panel decision as *United States* v. *Schmuck*, 776 F.2d 1368 (7th Cir. 1985). The panel decision was vacated and rehearing *en banc* was ordered, *United States* v. *Schmuck*, 784 F.2d 846 (7th Cir. 1986). The *en banc* opinion reversing the panel decision appears at 840 F.2d 384 (7th Cir. 1988). The Petition for Writ of Certiorari included an Appendix reproducing the opinions below.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) and Rule 20.1 of the Rules of the Supreme Court. The Judgment Order On Rehearing of the United States Court of Appeals for the Seventh Circuit, reversing the panel decision and upholding petitioner's conviction, was entered on January 21, 1988. The petition for a writ of certiorari was filed with this Court on February 16, 1988. This Court's order granting the petition for writ of certiorari was entered on May 16, 1988.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. CONSTITUTIONAL PROVISIONS

(a) No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

(*United States Constitution, Amendment Five*).

(b) In all criminal proceedings, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense. (*United States Constitution, Amendment Six*).

(c) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted. (*United States Constitution, Amendment Eight*).

2. STATUTORY PROVISIONS

(a) Whoever, having devised . . . any scheme or artifice to defraud . . ., for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . ., or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. (Mail Fraud, 18 U.S.C. § 1341).

(b) No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (Odometer Tampering, 15 U.S.C. § 1984).

(c) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter . . . shall be fined not more than $50,000 or imprisoned not more than one year, or both. (15 U.S.C. § 1990c, as added Pub. L. 94-364, Title IV, § 408 (2), 90 Stat. 985).

3. REGULATIONS

(a) CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged . . . . (Rule 31 (c), Fed. Rules of Crim. Procedure).

(b) MOTION FOR JUDGMENT OF ACQUITTAL.

(a) Motion before Submission to Jury . . . . The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses

charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty . . ., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged . . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal . . . . (Rule 29 (a) & (c), Fed. Rules of Crim. Procedure).

(c) INSTRUCTIONS. At the close of the evidence . . . any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . . (Rule 30, Fed. Rules of Crim. Procedure).

STATEMENT OF THE CASE

The facts of this appeal are not in dispute. Petitioner was engaged in a fraudulent scheme involving the sale of used cars with their odometers rolled back. He was indicted on August 23, 1983 in the United States District Court for the Western District of Wisconsin on twelve counts of violating 18 U.S.C. § 1341, prohibiting mail fraud. Jurisdiction in the District Court was based on 18 U.S.C. § 3231.

The mail fraud charges hinged on the fact that after petitioner sold the cars, the new owners mailed the title documents into the Wisconsin Department of Motor Vehicles in order to record the change in ownership. Petitioner raised the question of whether these mailings were so tangential to his scheme that they could not support a mail fraud conviction, by filing a motion to dismiss the indictment, citing *United States* v. *Maze*, 414 U.S. 395 (1974).

The District Court denied the motion to dismiss on November 11, 1983, by written order which appears in the Joint Appendix at p. 11 (hereinafter Joint App.) The Court interpreted *Maze*, *supra*, as holding that mailings which enhance the probability of detection are not "furthering" a scheme, and cannot support a mail fraud charge. However, the Court ruled that the jury should decide whether the mailings in question furthered the scheme.

The indictment against petitioner charged him, in Paragraph Four, with actions that constituted a violation of 15 U.S.C. § 1984, prohibiting odometer tampering. (The indictment appears at Joint App. p. 3) At the final pretrial conference, petitioner requested that an instruction be given to the jury on odometer tampering as a lesser included offense, relying on the existence of an inherent relationship between the lesser offense, odometer tampering, and the greater offense, mail fraud. The doctrine of "inherent relationship" allows conviction of a lesser offense even where the lesser offense includes elements not required for proof of the greater offense, and has been accepted as the better rule by the District of Columbia Circuit, (*United States* v. *Whitaker*, 447 F.2d 314 (1971)), the Tenth Circuit, (*United States* v. *Pino*, 606 F.2d 908 (1979)), and the Ninth Circuit, (*United States* v. *Johnson*, 637 F.2d 1224 (1980)).

Sometimes the inherent relationship rule benefits the prosecution, *vid. United States* v. *Cova*, 755 F.2d 595 (7th Cir. 1985), *United States* v. *Stolarz*, 550 F.2d 488 (9th Cir. 1977), *cert. den.*, 434 U.S. 851 (1977), *United States* v. *Cooper*, 812 F.2d 1283 (10th Cir. 1987), *United States* v. *Martin*, 783 F.2d 1449 (9th Cir. 1986). The District Court denied the request for the lesser included offense instruction, but did grant petitioner's request to let the jury

decide whether the mailings in question actually furthered his scheme. (The final pretrial conference order, of December 16, 1983, appears at Joint App. p. 29).

During the presentation of the government's case, petitioner's counsel brought out the fact that the documents which were mailed in almost every case actually contained the falsified odometer reading, so that a simple comparison of the mailed documents with the odometer statements from the prior car owners demonstrated petitioner's fraud. At the close of the government's case, petitioner moved for judgment of acquittal under F.R. Crim. P. 29(a). Petitioner relied on *United States* v. *Maze*, *supra*, and a Seventh Circuit case, *United States* v. *Galloway*, 664 F.2d 161 (1981). *Galloway* was another mail fraud prosecution grounded in an odometer tampering scheme, differing only in the circumstance that the mailings in *Galloway* did not contain odometer readings. The same District Court Judge as in the present case, the Honorable Barbara B. Crabb, had presided over the trial in *Galloway*, and had granted a directed verdict of not guilty in that case, relying on *Maze*. The Court of Appeals reinstated the conviction in *Galloway*, but suggested in a footnote that had the mailings contained odometer readings, detection of Galloway's scheme might have been rendered likely by the mailings, which would bring them within the scope of *Maze*.

The motion for judgment of acquittal was denied, and petitioner presented his evidence, tending to show how the mailings in question helped to uncover his scheme. Prior to counsels' arguments, the government requested a motion *in limine* prohibiting petitioner's counsel from arguing to the jury that petitioner had committed odometer tampering, but not mail fraud, on the grounds that such an argument was a back door way of introducing

the lesser included offense. The Court granted the motion. During rebuttal the prosecutor suggested to the jury that the defendant would escape punishment for his odometer tampering if he was acquitted of the mail fraud charges.

A verdict of guilty on all twelve counts in the indictment was returned on December 20, 1983, and petitioner renewed his motion for a judgment of acquittal, or in the alternative for a new trial. Petitioner argued that the Court, by denying the lesser included offense instruction, yet permitting the government to introduce a great deal of evidence relevant to odometer tampering, had allowed the government to bolster a weak mail fraud case by appealing to the jury's hostility to odometer tampering. The motion for judgment of acquittal or for a new trial was denied by the Court on December 29, 1983. (The order appears at Joint App. p. 60) Petitioner was sentenced on February 24, 1984, to 90 days in jail and fined $550.00, and placed on probation for four years. (The judgment of conviction and sentence appear at Joint App. p. 65) Petitioner filed a notice of appeal the same day, and execution of sentence was stayed pending appeal to the Court of Appeals for the Seventh Circuit, where jurisdiction was based on 28 U.S.C. § 1291.

Petitioner's appeal raised seven related issues, but the basic points were that the mailings in question were too counterproductive or tangential to his scheme to fairly support a charge of mail fraud, *United States* v. *Maze*, *supra*, and that the government used the fact that petitioner had engaged in odometer tampering to lower its burden of proof, leading the jury to convict him of mail fraud in a doubtful case rather than let an acknowledged odometer tamperer go free, *Keeble* v. *United States*, 412 U.S. 205 (1973). The lesser included offense instruction

would have been an appropriate way of preventing this appeal to jury prejudice.

Petitioner's appeal was argued orally on September 13, 1984. On November 12, 1985, the three judge panel reversed petitioner's conviction and ordered a new trial, ruling by a split decision that petitioner should have been afforded the lesser included offense instruction. (The panel decision appears at Joint App. p. 69) The decision is reported at *United States* v. *Schmuck*, 776 F.2d 1368 (7th Cir. 1985). The panel accepted petitioner's argument that the law of the Seventh Circuit applied the "inherent relationship" test for lesser included offense instructions, and found that a genuine issue of fact existed as to whether the mailings in question furthered the fraudulent scheme or were counterproductive or merely tangential to the scheme. The panel relied on *United States* v. *Cova*, 755 F.2d 595 (7th Cir. 1985), which used the "inherent relationship" rule to uphold a conviction for a lesser offense that did not fit within the greater offense under the traditional "elements" test. Judge Flaum, who sat on the panel in *Cova*, also sat on the panel in petitioner's case, and voted to apply the "inherent relationship" rule in both cases, although in *Cova* it was the government that benefitted by the application of the rule, and in the present case it is the petitioner who benefitted.

After the panel decision, the government requested a rehearing *en banc*. The request was granted (*United States* v. *Schmuck*, 784 F.2d 846 (7th Cir. 1986), and oral argument before the *en banc* panel was heard on June 9, 1986. (The order for rehearing appears at Joint App. p.85.) The argument focused on whether the "inherent relationship" test or the "elements" test should be used in determining a lesser or necessarily included offense under F.R. Crim. P. 31(c).

On January 21, 1988, the *en banc* Circuit reversed the panel decision and affirmed the conviction, expressly rejecting the "inherent relationship" test, and overruling *Cova*, *supra*. The decision appears at *United States* v. *Schmuck*, 840 F.2d 384. Judge Flaum, joined by Judge Cudahy, dissented, arguing for application of the "inherent relationship" rule as the established law of the circuit, and the better rule. Chief Judge Bauer, the author of the decision in *Cova* applying the "inherent relationship" test, and Judge Coffey, the third panel member in *Cova*, joined in rejecting the "inherent relationship" test in the present case, without explaining why their opinion on this question had changed. (The *en banc* opinion appears at Joint App. p. 87.)

Petitioner sought review of the decision of the Court of Appeals on the question of the sufficiency of these facts to support a mail fraud conviction under *United States* v. *Maze*, *supra*, and the question of the appropriate test under F.R. Crim. P. 31(c) for the giving of a lesser included offense instruction, where there is a possibility of jury hostility to the lesser offense causing conviction of the greater offense in a weak case, *Keeble* v. *United States*, 412 U.S. 205 (1973). The Petition for Writ of Certiorari was filed on February 16, 1988, and the Petition was granted by this Court on May 16, 1988.

SUMMARY OF ARGUMENT

Petitioner's conduct in tampering with odometers was fraudulent and criminal, but it was not furthered by the title registration process required by Wisconsin law. In fact, one of the purposes of title registration is to make it more difficult to get away with frauds and other crimes relating to automobiles, and in the present case the title records were an important link in the investigation and

proof of petitioner's odometer fraud. Mail fraud can only be predicated on mailings which assist the perpetrator to carry out a fraudulent scheme, and not on routine mailings only tangentially related to the fraudulent goal of the scheme.

Petitioner had a right to have the jury consider whether the mailings furthered his scheme or not, but the introduction of evidence regarding his odometer tampering informed the jury of his commission of a crime with which he was not charged, influencing the jury to convict him in a doubtful mail fraud case, rather than let him go free.

The danger that a jury will be influenced by proof of an uncharged crime is the basis for petitioner's right to a lesser included offense instruction. Only by inspecting the allegations of the indictment and the proof at trial can the danger of unfair prejudice be adequately evaluated, so the "inherent relationship" test for a lesser included offense is preferable to the "statutory elements" test, since the "inherent relationship" test is the only test that addresses the actual risk to the petitioner. The "statutory elements" test exalts empty formalism above the reality of unfair prejudice to the petitioner.

ARGUMENT

I. THE MAILING OF AUTOMOBILE TITLE DOCUMENTS TO THE DEPARTMENT OF MOTOR VEHICLES BY THE SUBSEQUENT PURCHASERS OF AUTOMOBILES, IN ORDER TO REGISTER A CHANGE IN TITLE AS REQUIRED BY STATE LAW, DOES NOT JUSTIFY A CHARGE OF MAIL FRAUD GROUNDED ON ODOMETER TAMPERING.

A. To Be Culpable, The Mailings Must Further The Fraudulent Scheme In A Concrete, Articulable Manner.

Petitioner's challenge to the sufficiency of the evidence in this case to sustain his convictions would be dispositive

of this case, if accepted. Intuitively, it is difficult to justify the creation of a mail fraud prosecution out of the raw materials of odometer tampering. However, in *United States* v. *Shryock*, 537 F.2d 207 (5th Cir.), *cert. denied*, 429 U.S. 1100 (1976), and *United States* v. *Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), convictions for mail fraud were sustained on similar facts, on the theory that the odometer tampering scheme had as its ultimate object the sale of the cars to the retail customers, and the mailing of title documents was necessary to consummate these sales. Thus, the court in *Galloway*, *supra*, declared:

> In order to sell his cars at the auction, it was necessary for Galloway to provide the dealer-purchasers, through the auction, with the necessary title documents. In order for the dealer-purchasers to then sell these cars, it was necessary for them to transfer title by mailing these title documents to the appropriate state agency. Only the experience of successful title transfer, therefore, would induce the dealer to return to the auction and purchase other automobiles from Galloway. Any failure in the title application process would have endangered Galloway's scheme by discouraging the retail dealer from making further purchases of his automobiles. 664 F.2d at 164-5.

What these cases fail to recognize is the lack of connection between the odometer tampering and the title registration. While it may be true that the dealers and purchasers of the automobiles would not continue to buy the automobiles if good title were not furnished to them, the fact that the odometer has been rolled back in no way affects the validity of the title conveyed. The opinion in *Galloway* speaks of a possible failure of title transfer as if it were a realistic possibility, without explaining how such a failure would in fact occur.

B. The Mail Fraud Statute Addresses Only Those Mailings Which Aid The Fraudulent Scheme, And Does Not Reach All Mailings Which Occur During The Course Of The Scheme.

The history of the mail fraud statute is a somewhat checkered one; a number of decisions of this Court seem to contradict each other regarding the outer limits of the statute's reach. In *Durland* v. *United States*, 161 U.S. 306 (1896), the Court considered the claim that, since the defendant's scheme did not involve misrepresentations as to past or present facts, it was not properly deemed "fraud". Defendant's scheme consisted in the mailing of solicitations to unknown individuals for investments in a "Tontine Investment" Bond, a sort of pyramid scheme promising future profits. The Court construed his scheme in strong language:

> In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. 161 U.S. at 314.

The Court, consequently, had no difficulty in finding that the defendant's conduct fell within the intended proscription of the statute:

> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed. . . . . 161 U.S. at 314.

Durland can be viewed as an instance of conduct violating the core interests protected by the statute; the mailing of something false with the design of receiving money in response.

Around twenty years after *Durland* the Court refined the application of the mail fraud statute in two cases, *United States* v. *Young*, 232 U.S. 155 (1914) and *United States* v. *Kenofskey*, 243 U.S. 440 (1917). In *Young* the defendant raised a challenge to the technical pleading in the indictment, claiming that it did not charge that he planned the use of the mails as an essential part of his scheme, but the Supreme Court upheld the adequacy of the indictment. The scheme in question involved a hardware store whose owners enlisted a broker in procuring loans and investments by the use of false financial statements. The broker was induced by the false information into selling the defendant's notes to banks, soliciting loans, etc. The mailing of false financial reports to the broker, and the response of the broker, the banks and the other investors, fits the traditional pattern of solicitation and response through the mail.

In *United States* v. *Kenofskey*, 243 U.S. 440 (1917), the underlying scheme was the submission of a false death benefits claim by a life insurance agent, which false claim was first handed by the defendant to his local supervisor, then mailed by the supervisor to the parent company, which responded by issuing a check for the claim, which the defendant converted. The Court dealt decisively with the defense that the mailings had not been done by the defendant in person, pointing out that the defendant knew that the insurance company would not pay the claim unless it received the false proofs, and he simply used the supervisor as his agent to accomplish the mailing.

Kann v. *United States*, 323 U.S. 88 (1944), began to draw some limits on the extent of the mail fraud statute. In *Kann*, the officers and directors of a corporation created a subsidiary corporation in order to skim off profits, and a mail fraud prosecution was predicated on the mail-

ing of checks from bank to bank for collection, after the defendants cashed the checks. Although the defendants were admittedly engaged in defrauding the corporation when they cashed the checks, the Court ruled that the statute did not extend to the mailings in question, because the scheme was completed when the defendants received their money:

> The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires. 323 U.S. at 94.

The fraudulent conduct in *Kann* was not within the core protection of the statute;

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other frauds to be dealt with by appropriate state law. 363 U.S. at 95.

C. This Court Must Analyze The Mailings Consistently With The Core Prohibition Of The Mail Fraud Statute.

Ten years after *Kann*, in *Pereira* v. *United States*, 347 U.S. 1 (1954), this Court appeared to depart from this line of analysis. *Pereira* concerned a confidence trickster who romanced and married a wealthy widow in order to persuade her to entrust him with a large sum of money, purportedly for investment, which he then embezzled. The victim of the scheme gave the defendant a $35,000.00 check, drawn on a Los Angeles bank, which the defendant deposited in a bank in El Paso. After waiting for the check to clear through Los Angeles, the El Paso bank paid the

money over to the defendant. The mail fraud prosecution was based on the mailing of the check by the bank from El Paso to Los Angeles, which was necessary before the El Paso bank would pay out any money.

Notwithstanding its ruling in *Kann*, *supra*, which is not discussed in *Pereira*, the Court upheld the conviction, stating that it was not necessary that the defendants contemplate the use of the mails as an essential element of the scheme, and that the defendants caused the use of the mails where it was reasonably foreseeable that a mailing would occur in the ordinary course of business.

The Court cited *United States* v. *Young* and *United States* v. *Kenofskey*, discussed *ante*, as its authority for this ruling. However, in relying on *Young* and *Kenofskey*, the Court went beyond the fact pattern of those cases. As the discussion above demonstrates, both *Young* and *Kenofskey* fit the core pattern of something false being sent through the mail in order to obtain money in response. The check mailed in *Pereira*, like the checks in *Kann*, was the actual fruit of a fraudulent scheme, and the mailing of the check for collection was an ordinary business transaction devoid of falsity. The defendant's gain was realized *because* the check was genuine, not fraudulent.

Still, in *Pereira* this Court decided that collecting the proceeds of the check was an essential part of the scheme, and that the mailing was incidental to that essential part, see 347 U.S. at 8. The practical effect of divorcing the analysis of the application of the mail fraud statute from its core conduct, as occurred in *Pereira*, is to create a mail fraud prosecution out of any fraudulent scheme where a mailing is foreseeable as a normal concomitant of a transaction that is essential to the scheme, including, *e.g.*, selling a car with a rolled-back odometer, or opening a

checking account in order to "kite" checks, *vid. Ohrynowicz* v. *United States*, 542 F.2d 715 (7th Cir.), *cert. denied*, 429 U.S. 1027 (1976), relied on in *United States* v. *Galloway*, *supra*.

A few years after *Pereira* this Court appeared to reaffirm its comment in *Kann* v. *United States*, *supra*, that not all frauds are within the purview of the mail fraud statute, in *Parr* v. *United States*, 363 U.S. 370 (1960). The scheme in *Parr* involved the long term looting of tax revenues from a school district in Texas by members of the school board and other strategically placed persons. The defendants collected the taxes by mail, wrote checks on false invoices, which were cashed and mailed for collection, and bought gasoline for personal use with school district credit cards, which were billed and paid through the mails, but none of these mailings were sufficient to bring their conduct within the statute. The Court pointed out that the tax bills were not alleged to be falsely inflated, that the school board was required by law to impose and collect taxes, and that the admitted crimes that were committed did not bring the case within the core of the statute:

> But the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process. 363 U.S. at 393-94.

The analysis in *Parr* cannot be reconciled with *Pereira*, because *Pereira* did not examine the core prohibitions of the statute in order to determine its proper scope. In subsequent rulings, this Court has adhered to the princi-

ple of determining how the mailings furthered the fraudulent aims of the scheme in deciding the scope of the statute. Thus, in *United States* v. *Sampson*, 371 U.S. 75 (1962), the defendants purported to assist businessmen to obtain loans, using unethical salesmen to make personal contact with prospects and persuade them to pay an advance fee for defendants' assistance. The salesmen would forward the applications and fees to the regional offices of the defendants' corporation, and the regional office would mail a form letter to the victims, giving the appearance that the desired services were being performed. The Court held that these mailings were within the statute, since they promoted the success of the scheme by delaying complaints:

> The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. 371 U.S. at 80-81.

Once again, something false was mailed with the expectation of a specific response furthering that specific fraud.

In *United States* v. *Maze*, 414 U.S. 395 (1974), this Court attempted to reconcile *Parr* and *Kann* with *Pereira*. The defendant in *Maze* was using stolen credit cards to obtain goods and services from motelkeepers. Charges of mail fraud were based on the mailings of sales slips by the motelkeepers to the bank for collection. The Court relied on *Pereira* to find that the defendant "caused" the mailings, since they were reasonably foreseeable, but held that the mailings in *Maze* were not sufficiently closely related to the fraudulent scheme to fall within the statute. The Court distinguished *Pereira* as involving mailings which significantly aided in the acquisition of the

money which was then stolen, whereas the mailings in *Maze* had no effect on the success of the scheme. Although the defendant in *Maze* derived some advantage from the delay inherent in the physical transmission of business correspondence between cities separated by large distances, he had no interest in which of the entities, motelkeeper, rightful card owner, or bank, bore the loss. Once he acquired the goods and services, his scheme was complete.

Thus, in *Maze* this Court adhered to the analysis of whether the fraudulent conduct was furthered by the mailed materials, in order to decide the proper application of the statute.

D. The Purpose Of The Mail Fraud Statute Is To Prohibit The Use Of The Mails To Deprive People Of Their Property By Cunning Schemes.

Recently, in a series of cases, this Court has looked to the aims of the mail fraud statute in defining its scope. *United States* v. *Lane*, 474 U.S. 438 (1986) involved an arson for profit scheme, in which proof of loss claims were submitted that falsely inflated the losses, as well as falsely denying that the defendants had caused the fire. After all payments were received, the defendants submitted additional fabricated invoices, to justify the moneys that they had already received for repair costs. The Court held that the mailing of the fabricated invoices after the receipt of the payments was designed to lull the victims and postpone investigation, just as in *Sampson*, *supra*.

McNally v. *United States*, 483 U.S. ___, 97 L.Ed.2d 292 (1987), overturned years of lower court decisions holding that mail fraud charges could be predicated on the taking of non-property "intangible rights":

> The prosecution's principal theory of the case, which was accepted by the courts below, was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights", such as the right to have the Commonwealth's affairs conducted honestly. 97 L.Ed.2d at 297.

The legislative history of the mail fraud statute was examined by this Court, supporting the proposition that the core prohibition of the statute is the use of the mails to disseminate falsehoods and reap a harvest from the unwary and greedy:

> The sponsor of the recodification stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property, (footnote)(. . . Representative Farnsworth proceeded to describe a scheme whereby the mail was used to solicit the purchase by greedy and unwary persons of counterfeit bills, which were never delivered . . . .). 97 L.Ed.2d at 300, with footnote 5.

It is significant that in *McNally* itself, the trial court dismissed five counts of mail fraud that were predicated on the mailing of income tax returns, on the authority of *Parr, supra*, that mailings required by law cannot be the basis for liability unless they themselves were false. The only count of mail fraud remaining was based on the mailing of a commission check by an innocent insurance company to the corrupt company involved in the scheme. See footnote 2, 97 L.Ed.2d at 298.

Most recently, in *Carpenter* v. *United States*, 484 U.S. ____, 98 L.Ed.2d 275 (1987), this Court decided that intangible *property* rights were included within the reach of the statute. This well publicized prosecution involved the use of advance knowledge of the contents of a financial advice column in the Wall Street Journal to engage in profitable stock transactions. The primary issue was whether this conduct was a "fraud" on the Journal; affirming the convictions, the Court noted:

> As we observed last Term in McNally, the words "to defraud" in the mail fraud statue have the "common understanding" of "'wronging one in his property rights by dishonest methods or schemes', and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching'", (citations omitted). 98 L.Ed.2d at 284.

In dealing with the issue of whether the mails were used to execute the scheme, this Court once again applied the analysis of mailing and response, although the novel feature was that the information in the mailings was not false:

> Lastly, we reject the submission that using the wires and the mail to print and send the Journal to its customers did not satisfy the requirement that those mediums be used to execute the scheme at issue. The courts below were quite right in observing that circulation of the "Heard" column was not only anticipated but an essential part of the scheme. *Had the column not been made available to Journal customers, there would have been no effect on stock prices and no likelihood of profiting from the information leaked by Winans* (emphasis added). 98 L.Ed.2d at 285.

Carpenter thus involved the mailing of information, not false in itself, but implicitly false in that the reader had no

knowledge that prior use was being made of the information for private gain.

E. The Mailings In Petitioner's Case Did Nothing To Aid His Scheme And In Fact Were Used Against Him.

Petitioner's argument in the instant case that the mailings of title documents were not sufficiently closely related to his scheme to support the charge of mail fraud was rejected on the authority of *United States* v. *Galloway, supra*. *Galloway* was wrongly decided, and should be disapproved. As the dissent in *Galloway* points out:

> The mailings did not conceal the fraud, produce profit for Galloway or contribute to the consumer's harm. The mailings resulted from a transaction to which Galloway was not a party and they were routine business mailings the purposes of which were immaterial to Galloway. 664 F.2d at 169 (Swygert, J., dissenting).

Judge Swygert would have applied the holdings in *Maze*, *Kann*, and *Parr*. Insofar as the registration of automobile ownership transfers through the titling process is *mandatory* under the law, the ruling in *Parr* is directly on point, both in *Galloway* and in the present case. The taxes that were embezzled in *Parr* were collected pursuant to the taxing power of the school district, and payment, at least, was compulsory. The use of the mails, however, was convenient, not compulsory:

> In actual operations . . . the assessor-collector would prepare the tax rolls for the current year and therefrom prepare and send out the tax statements by mail, and on receipt of checks in payment of taxes (*the great majority of which were received in the mails*) (emphasis added) would - with exceptions later noted - deposit them to the credit of the District

> in the depository bank, and then mail receipts to the taxpayers. 363 U.S. at 379.

In *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977), the ruling in *Parr* was constructed to apply to routine mailings regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise, even if the mailings were not required by law. Of course, *Parr* itself dealt with mailings of credit card invoices, as well as tax bills, so not all the routine mailings in *Parr* were required by law, either.

In the present case, petitioner argued that the mailings in question were routine mailings, themselves intrinsically innocent or even counterproductive to his scheme, see Memorandum in Support of Motion for Judgment of Acquittal, Joint Appendix p. 56 - 59, and further that the compulsory nature of title registration laws made it possible for any odometer tampering to be prosecuted for mail fraud, since mailings were bound to occur after the sale of any car with a tampered odometer, see Motion for Judgment of Acquittal or in the Alternative for a New Trial, Joint Appendix p. 62-64.

Petitioner presented one witness in his defense, James Peterson, an investigator for the Wisconsin Department of Transportation with eleven years of experience in investigating complaints against motor vehicle dealers, including odometer tampering. Mr. Peterson was called in support of petitioner's contention that the mailings in question were counterproductive to his scheme. His testimony, which is reproduced in the Joint Appendix at pages 34 to 42, established the following points:

The forms in use in Wisconsin for transferring title at the time of petitioner's activities contained space to report odometer figures (Joint App. p. 35):

That any time you see odometer mileage on any form or statement, it helps in the investigation of odometer tampering (Joint App. p. 37);

That the investigator in petitioner's case used the Department of Transportation records to obtain the addresses of the owners of the automobiles prior to petitioner (Joint App. p. 37);

That the investigator obtained from the previous owners the odometer statements prior to petitioner's (Joint App. p. 38);

That even if the odometer figures are not included in the records, the records are helpful to an investigation if they have the names and addresses of the previous owners (Joint App. p. 38).

This testimony fairly established petitioner's point that title records are maintained for the purpose, *inter alia*, of assisting in the investigation of crimes relating to automobiles, and that the title records in the present case enabled the investigators to follow the automobiles on paper back to the prior owners, and obtain from them proof of petitioner's role in changing the odometers. The same point was brought out by cross-examination of two of the government's witnesses, Ms. Ann Repka, a clerk in the Department of Transportation, and Allan Thompson, an FBI agent. See petitioner's Brief on Appeal, pages 8 - 9 and 13, and Trial Transcript, pages 3 - 23 and 99 - 111.

It was also established, through the testimony of these witnesses, that it is not legal to sell or operate an automobile in Wisconsin that has not had its title registered, and that the sole legal means of registering an automobile title is through the use of Department of Transportation forms, most of which are mailed to the Department as a common business practice. See the testimony of James

Peterson, Joint App. p. 40-41 and testimony of Ann Repka, Trial Transcript pp. 4-5, p. 11.

In short, like the taxes mailed in *Parr*, title registrations are mandatory, and like the credit card slips in *Maze* (which contained the forged signature by the defendant), the title documents (containing the false odometer readings generated by petitioner) were evidence against him. Since title documents by their very nature preserve a record of ownership, petitioner could not avoid leaving tracks, but to claim that the process of leaving tracks assisted or benefited his scheme in any way is nonsensical. Title registration is supposed to deter and hinder fraud, and it is therefor absurd to find that submitting title documents furthered the execution of petitioner's fraudulent scheme.

F. To Uphold Petitioner's Conviction Offends The Plain Meaning Of The Statute.

In *Parr* the Court commented, in *dicta*, on the defendant's claim that the government was seeking an interpretation of the mail fraud law so sweeping in its reach that few, if any, acts of fraud would escape its reach. See 363 U.S. at p. 386. The Court did not find it necessary to rule on that assertion in that case, but the present case raises the same specter: every person who tampers with an odometer for profit intends that the car be sold, and that the title shall be transferred, and is, *ipso facto*, guilty of mail fraud.

The Court of Appeals for the Seventh Circuit was not persuaded by petitioner's arguments in this regard, see the initial panel opinion, reproduced in the Joint App. at p. 69, p. 71:

> Regardless of what the defendant or any reasonable person might conclude upon reading the mail

> fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense. 776 F.2d at 1370).

Petitioner asserts that both the plain language of the statute, and the precedents of *Kann*, *Parr*, and *Maze*, support his position and require reversal of the Court of Appeals on this point. If prior judicial decisions of lower courts have distorted the plain meaning of the statute, it is the decisions that should yield, not common sense.

II. PETITIONER WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION IN ORDER TO PRESERVE A FAIR AND ACCURATE JURY DETERMINATION OF HIS CASE.

A. The Jury Was Instructed To Consider Whether The Mailings Were In Furtherance Of Petitioner's Scheme Or Not.

The primary issue that petitioner has raised in his defense in this case is whether the mailings with which he is charged can be fairly said to have been in furtherance of his odometer tampering scheme. Even though the District Court rejected his argument that the mailing of automobile title documents to the Department of Motor Vehicles after he had sold the cars could not, as a matter of law, support a mail fraud charge, the District Court did agree with petitioner that the issue was one for the jury to decide. The District Court's order denying petitioner's motion to dismiss the indictment, which appears in the Joint App. at p. 11:

> Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. Joint App. p. 11-12.

At the Final Pretrial Conference the District Court denied the government's request that the jury be instructed that the mailings furthered the scheme as a matter of law, and granted petitioner's request that the issue be left to the jury. See the partial transcript of the Final Pretrial Conference at Joint App. p. 19-24, and the Final Pretrial Conference Order:

> Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Joint App. p. 29.

Still later, when the petitioner moved for acquittal at the close of the government's case, the District Court adhered to her position that the question of whether the mailings furthered the scheme was a question for the jury. By sending the question to the jury, the District Court confirmed petitioner's contention that a reasonable argument could be made that the mailings did not further his scheme. As Judge Flaum stated in his dissent to the *en banc* decision in this case:

> The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury. *It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction* (emphasis added). The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the

fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering. 840 F.2d at 394, Joint App. p. 107 - p. 108.

Petitioner wishes to direct this Court's attention to the reasoning of Judge Flaum's dissent regarding the propriety of a broad rule for lesser included offenses when considering "umbrella-like" statutes, like the mail fraud statute, that can be violated in various ways:

> They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could ever be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently lead a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case (citation omitted). 840 F.2d 391, Joint App. p. 102.

B. The Evidence About Petitioner's Odometer Tampering Influenced The Jury Against Him On The Mail Fraud Charges.

A criminal defendant's right to an instruction on a lesser included offense flows from this Court's concern for fairness to the defendant. In *Keeble* v. *United States*, 412 U.S. 205 (1973), and *Beck* v. *Alabama*, 447 U.S. 625 (1980), this Court focused on the impact on the jury of the evidence at trial, and noted the enhanced danger to the defendant of an unwarranted conviction when evidence of the lesser crime is introduced at trial, but the jury is given

only the choice of conviction or acquittal of the more serious crime:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction - in this context or any other - precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction, *Keeble* v. *United States* at 412 U.S. 212 - 213.

The risk to the defendant depends on what the jury actually hears, not on the barren framework of statutory law. Furthermore, the plausibility of the defendant's argument for the lesser offense can only be judged from the evidence. To quote Judge Flaum once more:

> It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. 840 F.2d 390, Joint App. p. 100.

In the present case, the government worked hard to include evidence about the extent of petitioner's odometer tampering, and the damage it did to unsuspecting consumers. Over the petitioner's objection, FBI agent Thompson testified that petitioner admitted that he had tampered with the odometers on approximately 150 automobiles during his scheme (see Transcript of Final Pretrial Conference p. 7 - p. 8, and Transcript of Trial p. 102). Over the objection of petitioner, the government pre-

sented the testimony of 9 purchasers of cars which petitioner had sold, in order to inform the jury how much trouble and expense petitioner's actions had caused them, (see Transcript of Trial p. 70 - p. 97).

After petitioner's counsel had argued to the jury that his odometer tampering scheme was injured, not furthered, by the mailing of the title documents, the government attorney urged the jury in rebuttal to convict petitioner, or else he would go free:

> What Mr. Salzberg really wants to create for Mr. Schmuck is a perfect world where if he does the crime and it's perfect, no odometer statements go in and nobody complains. He gets away with it.
>
> When, if the other happens, where there is some mileage written in and a few people complain and that leads to an investigation and he's caught, he can just claim that the risk was too great and he obviously wasn't going to cover himself and he obviously shouldn't be convicted and I submit you shouldn't have it both ways. If you do any type of crime, you take the risk and that's what Mr. Schmuck did here. Trial Transcript p. 178 - p. 179.

This highlights the precise danger warned of in *Keeble;* the jury heard extensive evidence of one type of crime, and then was told they had to either convict petitioner of a different, more serious crime, or let him go free. In effect, fraud was committed on the jury, who were never informed that the government could prosecute petitioner for odometer tampering as easily as for mail fraud. In fact, the government brought a successful motion *in limine* to prohibit petitioner's counsel from informing the jury that the government could have prosecuted him for odometer tampering instead of mail fraud, see Trial Transcript p. 143 l. 16 - p. 146 l. 23.

Petitioner explicitly argued in his post trial Motion for Judgment of Acquittal or in the Alternative for a New Trial that the government had been allowed to use jury hostility to odometer tampering to lower its burden of proof, and thus obtain a mail fraud conviction in a weak case, see Joint Appendix p. 62-p. 64. This unfairness could have been most easily cured by the requested lesser included offense instruction on odometer tampering.

C. The Purpose Of Rule 31(c) Is More Appropriately Fulfilled By Considering Allegations In The Indictment And The Evidence At Trial, Rather Than By A Mechanical Comparison Of Statutory Elements.

Prior to its decision in the present case, the Seventh Circuit Court of Appeals had held, in *United States* v. *Stavros*, 597 F.2d 108 (1979), that the propriety of a lesser included offense instruction should be determined by looking at the allegations of the indictment, as well as the statutory elements of the offenses. The *en banc* opinion in the present case concedes that where the statute defining the offense is written in general language capable of wide variation in types of conduct, such as the mail fraud statute, "there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined", 840 F.2d at 386, Joint App. p. 91, but then retreats into an ambiguous statement that "Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme", *id.* This ambiguity only serves to conceal the plain language of the indictment, which alleges, in paragraph 4,

> It was further a part of this scheme that WAYNE T. SCHMUCK would cause the odometer mileage

> reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile. Joint App. p. 4.

As correctly noted in the panel decision, the language of the indictment did satisfy all the elements of the odometer tampering statute, 776 F.2d 1371, Joint App. p. 72. This demonstrates that odometer tampering was inextricably intermixed with the mail fraud charges in this case.

The conflict among the Federal Circuits between the strict statutory elements approach and the "inherent relationship" approach has been the subject of scholarly commentary, which criticizes the strict approach. In an article by Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 Brooklyn L.Rev. 191 (1984), the author states, concerning the elements test:

> What this standard offers to judicial economy, however, it reclaims from jurisprudential policy. It lacks the flexibility to fit the punishment precisely to the crime because it focuses on semantics instead of facts . . . . Moreover, the judicially declared purpose of Rule 31(c) is to permit the parties to react to the proof at trial. It is thus inappropriate for the standard to call for a purely abstract and mechanical assessment in defining the lesser included offenses of a particular crime. 50 Brooklyn L. Rev. 202-203.

Ettinger goes on to point out that the basis for the defendant's right to a lesser included offense has never been clearly articulated, but concludes:

> It might reasonably be said that such a right is fundamental to providing the defendant a fair trial and to preventing the imposition of unduly harsh punishment. Both of these justifications presume that the decision will reflect an accurate assessment

> of the facts arrived at after full consideration of all the relevant evidence, and neither is served by a system that bars deliberation on all of the criminal implications of the case. The right might, therefore, been seen as a constitutionally protected means of upholding the fifth amendment, which seeks to guarantee exactly such justice to the accused . . . . Given that the defendant is entitled to put before the jury every meritorious defense, it seems anomalous to proscribe the introduction of an ameliorative legal theory by denying the defendant a right to a lesser included offense charge, *id.* at 215-216.

Although the "inherent relationship" test results in the defendant's having a greater right than the prosecution to request lesser offense instructions based on the evidence, this abandonment of the doctrine of mutuality (itself a doctrine of less than constitutional dimension) does not in practice impose hardship upon the government:

> The prosecution, with investigative resources far greater than those of most defendants, is the only party with any control over the charge prior to trial. As a result, "in most cases the prosecution can foresee whether the proof is likely to develop strongly favoring a verdict on a lesser included offense, in which event the indictment should so charge, which is the prosecutor's option." The government's failure to make the best use of its earlier advantage should not be construed to affect the nature of the accused's single chance to specify the crime of which he or she may be guilty.
>
> Notice of the charges is the defendant's right, to waive if it becomes expedient to do so . . . . "It is . . . [the accused's] liberty that is at stake, and the worst that can happen to the government under the less rigorous instruction is [the defendant's] readier conviction . . ." (citations omitted), *id.* at 227-228.

The *en banc* opinion in the present case places great weight upon the certainty and predictability of the strict

elements test. Simplicity of use is not a sound reason for adopting a rule that fails to address valid concerns of fairness. The ancient tradition of jury trials in criminal cases is less simple and predictable than other possible methods, but considerations of justice and fairness outweigh the potential saving of time and effort. As the Supreme Court of California pointed out in *People* v. *Geiger*, 35 Cal. 3d 510, 199 Cal. Rptr. 45, 674 P.2d 1303, 50 ALR 4th 1055 (1984), a case which relied upon *Keeble* v. *United States*, supra, *Beck* v. *Alabama*, supra, and *United States* v. *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971):

> The People are deprived of no statutory or constitutional right when, after being afforded that opportunity, the trier of fact concludes that they have not proven the charged offense beyond a reasonable doubt and elects to convict the defendant of a related offense rather than acquitting the defendant who is, after all, guilty of the related offense. 674 P.2d at 1313.

Geiger is the subject of an annotation, *Lesser-Related State Offense Instructions: Modern Status*, 50 ALR 4th 1081, which collects state cases in which instructions were requested on lesser offenses that did not have all their statutory elements included in the greater offense charged, but bore a recognizable relation to the greater offense. The propriety of such instructions has been accepted in cases from California, Michigan, Alaska, Colorado, Montana, Nevada, New Jersey, and Utah, and arguably in Illinois, Georgia, Louisiana, and New York. The annotation observes:

> While the argument has been frequently advanced that this violates the doctrine of mutuality between prosecution and defense in a criminal case, the courts recognizing the propriety of the lesser-related offense instruction given at the defendant's request,

> even though the prosecution is never able to make a similar request, appear to feel that the defendant's right to be convicted only of an offense actually committed has a higher priority than any formal concept of mutuality. 50 ALR 4th at 1090.

A comment by Yusem in 84 Dickinson L. Rev. 125 (1979), *The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts*, briefly surveys the various lesser included offense theories applied in the different States, identifying four conceptually distinct treatments of the question, including the pleadings approach, which examines the accusatory pleading, the statutory evidence approach, which examines the evidence at trial, the strict statutory approach, which examines only the statutory elements, and the Model Penal Code approach, which combines the strict statutory approach with a broader "injury to the same interest" approach. The comment points out the illusory nature of the "consistency and predictability" of the strict statutory approach:

> Since this determination is made in the abstract, with reference only to the language of the controlling statutes, theoretically a static number of lesser included offenses exists. Because the theory is conceptual in nature, however, inquiries into the relationship between the two statutes become exercises in statutory interpretation. The test "is not as simple as defining the elements of the two offenses separately and laying them side by side . . ." because borderline situations occur.
>
> Because the statutory approach does not consider factual evidence or pleadings, it is inherently inflexible. A court's interpretation of the language of a statute becomes more important than operative facts and, perhaps, more important than the purpose of

the doctrine as an aid to both the prosecution and defense. 84 Dickinson L.Rev. 129-130.

> The basic problem with the strict statutory approach is its inherent inflexibility. The meaning of words rather than the nature of offenses is the paramount inquiry. This approach subverts the basic function of the doctrine, to aid the prosecution and defense, *id.* at 144.

The asymmetry between the prosecution's right to request a lesser offense instruction and the defendant's right is the unavoidable corollary of the defendant's right to a fair trial, free from the pressure of prejudice. Only an approach that examines the evidence before the jury can adequately protect the defendant against the risk of unwarranted conviction:

> It is, after all, that evidence which would convince the jury the defendant was guilty of some offense, even if something less than the charged offense, and it is therefore that same evidence which gives rise to whatever temptation the jury may feel to convict of the charged offense in spite of a failure of proof as to one or more prerequisites. *United States* v. *Johnson*, 637 F.2d 1224 (9th Cir. 1980) at 1238-1239.

III. CONCLUSION

For the foregoing reasons, the petitioner's conviction of mail fraud must be reversed, and a judgment of acquittal entered, or at least a new trial ordered, with directions to instruct the jury on the lesser included offense of odometer tampering.

Respectfully submitted,

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